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No. 99-916

IN THE

SUPREME COURT OF THE UNITED STATES

Enron Power Marketing, Inc., Petitioner,

v.

Northern States Power Co., Respondent.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE ELECTRICITY CONSUMERS RESOURCE COUNCIL, AMERICAN IRON AND STEEL INSTITUTE, CHEMICAL MANUFACTURERS ASSOCIATION, TRANSMISSION ACCESS POLICY STUDY GROUP, AND TRANSMISSION DEPENDENT UTILITY SYSTEMS AS AMICI CURIAE IN SUPPORT OF ENRON POWER MARKETING INCORPORATED'S PETITION FOR CERTIORARI

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ENRON POWER MARKETING, INC.,
Petitioner,

v.

NORTHERN STATES POWER CO.,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF
THE ELECTRICITY CONSUMERS RESOURCE
COUNCIL,
AMERICAN IRON AND STEEL INSTITUTE,
CHEMICAL MANUFACTURERS ASSOCIATION,
TRANSMISSION ACCESS POLICY STUDY GROUP,
AND
TRANSMISSION DEPENDENT UTILITY SYSTEMS
AS AMICI CURIAE IN SUPPORT OF
ENRON POWER MARKETING INCORPORATED'S
PETITION FOR CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, Amici, The Electricity Consumers Resource Council ("ELCON"), The American Iron and Steel Institute ("AISI"), The Chemical Manufacturers Association ("CMA") (together, "Industrial Consumers"), The Transmission Access Policy Study Group ("TAPS"), and The

Transmission Dependent Utility Systems (TDU Systems) respectfully move for leave to file the attached Brief of Amici Curiae in Support of the Petition for Writ of Certiorari filed by Enron Power Marketing, Inc. ("Enron"). Enron has consented to the filing of the brief. This motion is necessary because Respondent has denied consent.

Industrial Consumers, TAPS, and TDU Systems each have a significant interest in this case. First, each of the amici participated in the lower court proceedings as amici curiae. Second, the decision rendered by the Court of Appeals for the Eighth Circuit in Northern States Power Co. v. FERC, 176 F.3d 1090 (8th Cir. 1999), adversely impacts the development of competitive wholesale electric power markets. Consumers and transmission-dependent utilities have a substantial interest in a vibrant and competitive electric power industry. Vertically integrated investor-owned utilities are already citing the Eighth Circuit's decision to ensure that FERC does not have authority to prevent discrimination in curtailment of interstate transmission by transmission-owning utilities. Alternative suppliers of electricity that are dependent on the transmission facilities of others will not have a fair opportunity to compete unless they can use the same quality of electric service as vertically-integrated utilities.

The issues presented by this case are of exceptional importance to amici and their members. The Eighth Circuit decision in NSP could threaten the development of a competitive electricity industry by denying wholesale, transmission dependent competitors of traditional utilities the ability to offer customers comparable firm transmission service--to the detriment of competitors and consumers. Amici Industrial Consumers and consumer-owned and transmission-dependent utilities represent sectors not otherwise represented.

Amici therefore respectfully seek leave of this Court to file the attached brief in support of Enron's petition for writ of certiorari.

Respectfully submitted,

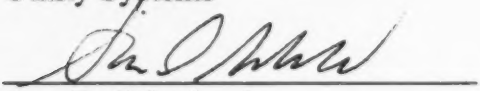
The Electricity Consumers Resource Council

The American Iron and Steel Institute

The Chemical Manufacturers Association

The Transmission Access Policy Study Group

The Transmission Dependent Utility Systems



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December 3, 1999

QUESTIONS PRESENTED

(1) Whether the decision of the Eighth Circuit in Northern States Power Co. v. FERC, 176 F.3d 1090 (1999) (the "NSP Decision"), conflicts with the decision of the United States Supreme Court in Federal Power Commission v. Louisiana Power & Light Co., 406 U.S. 621 (1972), where the Supreme Court, interpreting analogous provisions of the Natural Gas Act ("NGA"), held that the Federal Power Commission's plan for curtailing natural gas pipeline transportation to all customers, adopted to prevent undue discrimination among transportation customers, did not exceed the Commission's NGA section 1(b) jurisdiction even though it applied to transportation of direct gas sales to retail customers.

(2) Whether the decision of the Eighth Circuit in NSP threatens orderly administration of the Federal Power Act ("FPA") by denying the Federal Energy Regulatory Commission ("FERC") jurisdiction to assure non-discrimination in curtailment of transmission in interstate commerce.

(3) Whether the decision of the Eighth Circuit in NSP threatens the development of a competitive electricity industry by denying transmission dependent competitors of traditional utilities the ability to obtain comparable firm electric service—to the detriment of competitors and consumers.

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BRIEF OF THE ELECTRICITY CONSUMERS RESOURCE COUNCIL, AMERICAN IRON AND STEEL INSTITUTE, CHEMICAL MANUFACTURERS ASSOCIATION, TRANSMISSION ACCESS POLICY STUDY GROUP, AND TRANSMISSION DEPENDENT UTILITY SYSTEMS AS AMICI CURIAE IN SUPPORT OF ENRON POWER MARKETING INCORPORATED'S PETITION FOR CERTIORARI

Pursuant to Supreme Court Rule of Procedure 37, Amici Curiae, The Electricity Consumers Resource Council ("ELCON"), The American Iron and Steel Institute ("AISI"), The Chemical Manufacturers Association ("CMA"), The Transmission Access Policy Study Group ("TAPS"), and The Transmission Dependent Utility Systems ("TDU Systems") support the Petition for Writ of Certiorari filed by Enron Power Marketing, Inc. ("Enron") in this case.*

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* No other party other than counsel for Amici Curiae authored the brief, in whole or in part, or made monetary contributions to the brief.

OPINION BELOW

Northern States Power Co. v. FERC, 176 F.3d 1090 (8th Cir. 1999).

STATUTORY PROVISIONS

Federal Power Act ("FPA"), 16 U.S.C. §§ 824(b), 824d(b), 824d(e) (1994).

DESCRIPTION OF AMICI

The Electricity Consumers Resource Council ("ELCON") is an association of industrial consumers of electricity organized to promote the development of coordinated and rational federal and state policies that will assure an adequate, reliable, and efficient electricity supply for all users at competitive rates.

The American Iron and Steel Institute ("AISI") is the principal trade association of the North American steel industry.

The Chemical Manufacturers Association ("CMA") is a nonprofit trade association whose member companies represent more than ninety percent of the productive capacity of basic industrial chemicals in the United States.

The Transmission Access Policy Study Group ("TAPS") is an informal association of municipal, cooperative and investor-owned utilities and other supporters in more than 24 states, promoting open and non-discriminatory transmission access. Many TAPS members are transmission-dependent.

The Transmission Dependent Utility Systems ("TDU Systems") are seven transmission-dependent generation and transmission ("G&T") cooperatives serving (through their

member distribution cooperatives) over 2.5 million metered accounts in seven states.

Amici participated as amici curiae in the proceedings below.

STATEMENT OF THE CASE

This case involves the question whether the U.S. Federal Energy Regulatory Commission ("FERC"), in order to prevent undue discrimination in transmission of electric power, has jurisdiction to prescribe transmission curtailment rules that affect interstate transmission that is associated with a transmission-owning utility's direct sales of electric energy to retail customers. In the NSP Decision, the Eighth Circuit ruled that FERC's insistence that Northern States Power Company ("NSP") conform to the nondiscriminatory, open-access transmission requirements mandated by a FERC rule—Order 888—intruded upon state jurisdiction over retail sales of power.

A. The Non-Discrimination Provisions of FERC Order 888

Order 888 was adopted following a comprehensive, multi-year rulemaking.[1] FERC found that transmission-owning public utilities provided to themselves and their affiliates transmission service superior to the service provided to other eligible customers, Order 888 at 31,635, in violation of the nondiscrimination provisions of the FPA. 16

[1] Promoting Wholesale Competition through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order 888, [Reg. Preambles Jan. 1991-June 1996] F.E.R.C. Stats. & Regs. ¶ 31,036 [hereinafter cited as Order 888], *clarified*, 76 F.E.R.C. ¶¶ 61,009, 61,347, *order on reh'g*, Order 888-A, III F.E.R.C. Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order 888-B, F.E.R.C. ¶ 61,248 (1997), *appeal pending sub nom.* Transmission Access Policy Study Group v. FERC (D.C. Cir. No. 97-1715).

U.S.C. § 824d(b), 824d(e) (1994). To remedy this discrimination, FERC ordered all jurisdictional public utilities to adopt a pro forma open-access transmission tariff ("OATT") that included provisions to govern pro rata curtailment of firm transmission service. Order 888 at 31,636. FERC found that pro rata curtailment is a "key means" for ensuring non-discriminatory open access and is a fundamental term and condition of the OATT. Id. at 31,749. The comprehensive rulemaking that produced FERC Order 888 is currently the subject of a judicial review action pending in the United States Court of Appeals for the D.C. Circuit. Transmission Access Policy Study Group v. FERC, Complex Case No. 97-1715.

Order 888 allows a transmission owner, such as NSP, to withhold from the firm-service market transmission capacity that it currently uses or anticipates using to provide service to retail direct-sale customers, referred to as "native load." Order 888 at 31,694, 31,745. Thus a transmission-owning utility is not obligated under Order 888 to sacrifice transmission capacity needed for retail customers that it serves pursuant to state law. Instead, a utility is authorized under Order 888 to retain for its direct sales and offer only on an interruptible basis the capacity on its system that it uses or anticipates using for service to its native load. However, Order 888's rule restricting the curtailment of firm transmission service does not allow NSP or other transmission-owning utilities to offer customers firm service and then treat them as interruptible so that NSP can divert the capacity sold as firm to its direct-sale uses. Order 888 at 31,957.

B. FERC's NSP Orders

NSP applied to FERC for permission to use its transmission tariff to permit NSP to grant a priority to transmission for sales to its retail native load customers in

the event that curtailment of firm transmission service is required.

FERC denied NSP's proposal to curtail only firm point-to-point transmission customers and not network/native load customers when NSP exhausts all network/native load generation redispatch options. See Northern States Power Co., 83 F.E.R.C. ¶ 61,338 at 62,369 (1998). FERC found that this curtailment scheme would violate the comparability requirements of Order 888 and the fundamental OATT provision requiring pro rata curtailment of all firm transmission customers.

FERC denied a request for further clarification and rehearing, rejecting NSP's argument that the Commission was exceeding its jurisdiction. FERC emphasized that it was not regulating nonjurisdictional bundled direct sales, but avoiding preferential treatment by NSP of its native load customers in curtailment situations. Northern States Power Co., 84 F.E.R.C. ¶ 61,128 at 61,671 (1998).

C. Decision of the Eighth Circuit

In the context of reviewing FERC orders invalidating curtailment provisions in NSP's tariffs, the Eighth Circuit held that FERC exceeded its jurisdictional reach when it ruled that transmission providers cannot discriminate between curtailment of wholesale customers in interstate commerce and retail (intrastate "native load") customers. The Eighth Circuit held that FERC's "attempt to regulate the curtailment of electrical transmission on native/retail consumers is unlawful, as it falls outside of the FPA's specific grant of authority to FERC." Northern States Power Co. v. FERC, 176 F.3d 1090, 1096 (8th Cir. 1999) (the "NSP Decision").

D. Subsequent Developments

On remand, FERC issued an order allowing NSP to curtail firm point-to-point transactions after all redispatch options have been exhausted without pro rata curtailments for network/native loads. Northern States Power Co., 89 FERC ¶ 61,178 (1999). In response to this order, NSP submitted a letter to FERC, Docket ER98-1898, on November 19, 1999 withdrawing its proposed OATT modifications. If and when the application becomes effective, the instant case will be mooted leaving in place the Eighth Circuit decision impairing FERC's jurisdiction. Under these circumstances, it would be appropriate for this Court to vacate the NSP Decision and remand to the Eighth Circuit with an instruction to dismiss the case.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted on two grounds: First, there is an apparent conflict with respect to the scope of FERC's authority to remediate discrimination between the Eighth Circuit's NSP Decision and a Supreme Court precedent arising under counterpart provisions of the Natural Gas Act--which this Court has found substantially identical to FPA provisions.

Second, this case presents a question of exceptional importance to fostering competition in the electric power industry. As consumers and transmission-dependent utilities, it is critical to Amici that independent power marketers (such as Enron) and other wholesale suppliers be able to compete and to offer customers the same continuous and reliable firm service as incumbent vertically-integrated providers. Amici are concerned that if the Eighth Circuit decision stands, the concept of the uniform quality of "firm" transmission service may be eviscerated.

The NSP Decision is inconsistent with, and does not address, the U.S. Supreme Court's ruling in Federal Power Commission v. Louisiana Power & Light Co., 406 U.S. 621 (1972) ("LP&L"), which held that the Federal Power Commission ("FPC") has authority under the analogous Natural Gas Act to eliminate undue discrimination in the provision of interstate natural gas transportation and to administer curtailment even though retail customers may be affected. In conflict with LP&L, the NSP Decision erroneously concludes that FERC exceeds its jurisdiction when FERC seeks to remedy undue discrimination in the provision of interstate transmission services through adoption of transmission curtailment rules that affect transmission associated (or "bundled") with retail sales of power. Contrary to the Eighth Circuit's ruling, FERC has unqualified and exclusive federal jurisdiction over transmission of electric power in interstate commerce as it does over transportation of gas in interstate commerce.

The NSP Decision has adverse implications for FERC jurisdiction over restructuring:

(1) The goal of competitive power markets will remain illusory if other wholesale suppliers are not able to use the same reliable firm transmission service that a vertically-integrated utility can. Unless there is one uniform firmness of transmission service, these competitors will be unable to compete and provide customers with a viable alternative to traditional providers. If FERC has no jurisdiction to require proportionate curtailment of interstate transmission, its jurisdiction to regulate other aspects of interstate transmission service may be also called into question.

(2) Vertically-integrated utilities have already argued that the NSP Decision undermines a December 16, 1998 decision that FERC issued in connection with its implementation of a transmission loading relief ("TLR")

policy designed to assure grid reliability during periods of threatened overloads. FERC ordered that transmission-owning utilities cannot discriminate in curtailing transactions under the TLR policy between their wholesale customers and native load.

(3) The NSP Decision counters FERC efforts to administer the interconnected grid in the interest of reliability rather than parochial state interests. Under the rationale of the NSP Decision, the argument will be that FERC simply cannot take an action which in the view of any given state commission curtails service to that state's customers. Thus, the decision has adverse implications for other FERC initiatives, past and pending, that have imposed or would impose a duty on transmission providers to avoid discrimination.

I. The Eighth Circuit's Decision In NSP v. FERC Conflicts With Supreme Court Precedent

A. The NSP Decision Conflicts With LP&L, Where This Court Held That The Commission May Act to Avoid Discrimination in Interstate Gas Transportation Associated With Retail Sales

The FPA mandates that FERC eliminate undue discrimination in the provision of services subject to its jurisdiction. Curtailment priority is an integral part of jurisdictional transmission of electric energy in interstate commerce. Interstate transmission curtailment priorities are wholly within FERC's transmission jurisdiction and are entitled to preference under the Supremacy Clause even if curtailment may affect a transmission-owning utility's service to direct retail customers.

A Supreme Court decision arising under parallel provisions of the Natural Gas Act ("NGA") has adjudicated the principal legal question. LP&L, 406 U.S. at 621, involved the issue of whether FERC's predecessor, the FPC, had authority to effect orderly curtailment plans involving both direct sales and sales for resale.

In LP&L, this Court reversed the Fifth Circuit's determination that the provision of NGA section 1(b) withholding jurisdiction over direct sales barred the FPC from authorizing United Gas Pipe Line Company's transportation curtailment plan, which applied equally to sales-for-resale and direct-sale customers. In LP&L, this Court ruled that the FPC may exercise jurisdiction over curtailment of interstate transportation of gas where gas is being transported to a retail customer to avoid undue discrimination. The curtailment authority arises from the FPC's jurisdiction over interstate transportation. This Court concluded that the FPC is not precluded from exercising jurisdiction by the NGA clause withholding federal jurisdiction to set the rates for direct sales. See 406 U.S. at 641.

The only difference between LP&L and NSP is that FERC promulgated the firm-service transmission curtailment rule of FERC Order 888 at issue in the NSP Decision pursuant to FPA section 201(b) jurisdiction over interstate transmission of electric energy and FPA section 206, which imposes on FERC the duty to eliminate undue discrimination in interstate transmission. FPC adopted the natural gas pipeline curtailment plan at issue in LP&L under NGA section 1(b) jurisdiction over interstate transportation of natural gas and NGA sections 4 and 5, which impose on FERC the duty to eliminate undue discrimination in interstate transportation. This Court observed in Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981), that "relevant provisions" of the FPA and the NGA are "in all material respects substantially identical." This Court has an

"established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." Id.; FPC v. Conway Corp., 426 U.S. 271, 281 (1976). See also Kentucky Utilities Co. v. FERC, 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985).

LP&L holds that the Commission may exercise jurisdiction over interstate transportation or transmission to avoid discrimination in curtailment regardless of whether the interstate transportation or transmission is associated with direct retail sales. In LP&L, this Court recognized that Commission administration of a uniform system of curtailment was essential. Attempts by individual states to craft national policy would likely result in constitutionally prohibited undue interference with interstate commerce and a conflicting patchwork of individual state initiatives. See 406 U.S. at 632-33.

B. The Panel's Decision on Jurisdiction Also Conflicts with the Decision of the D.C. Circuit in Mississippi River Transmission Corp. v. FERC

The NSP Decision also is inconsistent with Mississippi River Transmission Corp. v. FERC, 969 F.2d 1215 (D.C. Cir. 1992) ("MRT"), where the D.C. Circuit ruled: "FERC is not barred from regulating a pipeline's interstate transportation of natural gas merely because the sale of gas being transported is not itself subject to federal regulation. FERC's authority over such transactions is beyond dispute." Id. at 1217 (citing FPC v. East Ohio Gas Co., 338 U.S. 464, 468 (1950)).

MRT held that the clause in NGA section 1(b) confining FERC's rate setting authority to direct sales did not bar the Commission from exercising its statutory mandate to regulate interstate transmission when the transportation is bundled with a direct sale of natural gas. Id.

at 1218. The D.C. Circuit observed that state regulation of the conditions of interstate transportation of gas bundled for direct sale would risk parochial administration of gas transportation—an intolerable result:

> States cannot as effectively regulate the interstate transportation of gas bundled for direct sale to customers for the simple reason that the primary concern of state regulators is the interests of their state's citizens, who doubtless would prefer to pay less for transportation than those outside the state.

Id. If the Eighth Circuit's NSP Decision remains in place, the risk of parochial administration of the interstate grid is very real.

II. FERC's Plenary Federal Power Act Jurisdiction Over The Interstate Transmission Grid Is Threatened By The Eighth Circuit's Ruling Excluding Transmission Bundled With Direct Sales From The Anti-Discrimination Requirement Of Order 888

This Court should grant certiorari because the NSP Decision casts a legal cloud over FERC's efforts to regulate the interstate transmission grid and thereby redress discrimination in interstate transmission of power. Contrary to the Eighth Circuit, neither Minnesota nor Wisconsin (or any other of the several states in which NSP operates) can allocate the finite capacity of NSP's FERC-jurisdictional transmission system, where such allocation conflicts with the FERC's orders and discriminatorily favors in-state companies and users.

The unabashed pronouncement of the NSP Decision is to permit "preferential treatment to native customers...." 176 F.3d at 1094 n.5. Contrary to the NSP Decision, the impermissible consequence of empowering the states to

grant retail customers such superior use rights is to accord wholesale service priority inferior to bundled retail transmission service, contrary to FERC's determination. In the NSP orders FERC exercised its jurisdictional mandate to remedy and protect against undue discrimination. The requirement that states respect FERC-filed wholesale terms is a matter of enforcing the Supremacy Clause. Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 963-967 (1986); Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 370 (1989). In Order 888 (at 31,966) FERC correctly observed that:

> When Congress enacted the F[ederal] P[ower] A[ct], it gave the Commission exclusive jurisdiction over the rates, terms and conditions of transmission in interstate commerce by public utilities. The Supremacy Clause of the Constitution provides that federal laws enacted pursuant to the powers delegated to the federal government by the United States Constitution are the supreme law of the land.

A. The NSP Decision Threatens Competition By Thwarting Competing Wholesale Providers Who Must Be Able To Obtain Transmission Service As Reliable As That Of Traditional Incumbents

As consumers and transmission-dependent utilities, Amici have a strong interest in fostering the viability of alternative electricity providers as competitors to traditional incumbent utility providers. The NSP Decision strikes at the heart of the ability of Enron and other wholesale power suppliers, such as transmission-dependent utilities, to obtain firm electric service that is comparable in its reliability to that offered by incumbent, vertically-integrated utilities.

Under the NSP Decision, each state can set its own rules for transmission of bundled retail sales within that

state, without regard to what other states do and without regard to FERC's rules, while FERC is limited to setting rules for wholesale and "unbundled" retail uses. No regulatory body would have authority to ensure a coherent scheme for the use and allocation, among all users, of what is necessarily the single transmission network.

As we move toward retail competition on a state-by-state basis, it is essential that FERC be authorized to establish a single scheme for use of the grid that does not relegate use of the grid for wholesale sales or retail choice programs to second-class citizen status. Consumers will not switch to alternative suppliers if they cannot rely on the contract to receive power. The absence of a clear, unified set of rules also would enable one state to cripple customer choice programs in a neighboring state, by according in-state bundled sales a higher priority than unbundled deliveries to its neighbors.

FERC has ordered that transmission-owning utilities may not favor transmission to their own native load (retail) customers at the expense of other firm transmission customers who are competitors. The NSP Decision strips FERC of jurisdiction to prohibit discrimination and thereby deprives alternative suppliers of the ability to offer comparable firm electric service. It is critical that alternative suppliers of power that are dependent on the transmission facilities of others have a fair opportunity to compete, including the ability to offer electric service as reliable as that of their vertically-integrated competitors.

B. FERC's Transmission Loading Relief Procedures

The North American Electric Reliability Council ("NERC") is a not-for-profit corporation formed to promote the reliability and adequacy of bulk electric supply by the electric systems of North America. NERC responded to

numerous instances of transmission line overloads in the eastern United States in 1998 that were due to so-called "loop flows," or parallel flows of power, by developing transmission curtailment procedures called transmission loading relief procedures ("TLR"). FERC has reviewed and approved these procedures subject to certain conditions in an Order on Petition for Declaratory Order, In re North American Electric Reliability Council, 85 F.E.R.C. ¶ 61,353 (1998). One of the conditions that FERC imposed was that curtailment of parallel flows should not depend on whether they are associated with a "native load transaction, network service, or an interchange transaction."[2] In so holding, FERC expressly cited its decision in Northern States Power Co., 83 F.E.R.C. ¶ 61,338 (1998), where FERC had "rejected the argument that firm transmission customers have a lower curtailment priority than native load."

Even before the ink had dried on the NSP Decision, a utility, Virginia Electric and Power Company, filed a request for stay of FERC's May 12, 1999 order on TLR (Docket EL98-52/ER99-1986, dated June 11, 1999) asserting that the "Commission cannot require that curtailments be implemented proportionately if the curtailment would result in the shedding of bundled retail load without violating the Court of Appeals' order" in NSP.[3] A similar protest was filed on June 11, 1999, by Southern Company (Docket EL98-52), noting that in light of the Eighth Circuit's NSP Decision "the Commission should not attempt to regulate curtailment of bundled retail service."[4]

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[2] "Interchange transactions" are defined as scheduled sales for resales in interstate commerce where the energy is transmitted from one control area to another.

[3] See Exhibit A at 2 to Industrial Consumers Amicus Filing Eighth Circuit.

[4] Id., Exhibit B at 7.

Amici are concerned that if the NSP Decision stands, transmission-owning utilities who seek to give preference to native load in administering curtailments will seek to reopen FERC's TLR Orders, arguing that under the NSP Decision, FERC exceeds its jurisdiction when it imposes curtailment on native load inconsistent with state law priorities.

C. FERC Actions To Avoid Discrimination In Interstate Transmission Of Power Must Not Be Impeded By Parochial State Interests

In the context of striking protectionist state regulation as violative of the Interstate Commerce Clause,[5] this Court has expressed its disapproval of a state order that "is designed to gain an economic advantage for the citizens of [its state] at the expense of [a utility's] customers in neighboring states." See New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982) (holding that a state public utility commission's order requiring privately-owned and federally-licensed public utility to sell within state hydroelectric energy it had been exporting violated the Commerce Clause.) The states of Minnesota and Wisconsin cannot afford their residents a preferred right of access over out-of-state users to NSP's transmission system because such protectionist regulation is off-limits to the states. Yet the NSP Decision finds that because states have authority over retail sales of power, FERC's authority to remedy discrimination must be applied in a manner that does "not encroach upon the authority of the regulatory commissions of the states." Northern States Power, 176 F.3d at 1096.

FERC has recently proposed to establish Regional Transmission Organizations ("RTOs"), which has "as its objective for all transmission-owning entities in the Nation,

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[5] U.S. Const., art. I, § 8, cl. 3.

including non-public utility entities, to place their transmission facilities under the control of appropriate regional transmission institutions in a timely manner." *RTO* Proposed Rule, 64 Fed. Reg. 31,389, 31,391 (1999). FERC bases this rulemaking on the need to avoid discrimination in power markets that has manifested itself in several ways, including delays in responding to requests for transmission service from competitors and questions over the accuracy of postings of available transmission capacity. See id. at 31,397 - 31,413.

Large multi-state RTOs have as a principal responsibility to implement curtailment in a manner that best protects the reliability of the grid, overriding a given state's parochial interest that its load not be curtailed or that its incumbent suppliers retain in perpetuity their native load. The NSP Decision calls into question whether an independent system operator or RTO can direct the incumbent transmission-owning utility to transmit another utility's power if it means shedding native load.

Actions that are necessary to avoid discrimination must be recognized as binding on the states under the Supremacy Clause and as a legitimate exercise of FERC's plenary authority over interstate transmission and its duty to remedy discrimination.

Consistent with the FPA and the Supremacy Clause, FERC must be the ultimate arbiter of the reliability of the transmission grid and any uses made of that grid to effect the delivery of electric energy. Amici believe that it is essential to reliability that FERC, and not fifty states each expressing parochial interests, determine policies and procedures for administration of the electric power grid.

III. The Eighth Circuit's Decision in NSP is Clearly Erroneous

A. The Eighth Circuit Mistakenly Found An Irreconcilable Conflict Between Compliance With Order 888's Firm-Service Curtailment Rule And NSP's Responsibilities Under State Law

The firm-service curtailment rule was adopted by FERC to eliminate discrimination in interstate transmission.

The Eighth Circuit mistakenly found that NSP was wedged between a "rock and a hard place" because Order 888 required NSP to breach state laws that require utilities to offer uninterrupted service to native load. See Northern States Power, 176 F.3d at 1095. This was a serious factual error. In fact, Order 888 provides a transmission provider broad latitude to withhold its transmission capacity from the market if the capacity is needed to provide service to its existing or forecasted native load and network service.

A utility calculates the amount of available transmission capacity, or "ATC," that it will post on an electronic communications system as available for service pursuant to the terms and conditions of its nondiscriminatory OATT. Under Order 888, a transmission owner such as NSP is permitted "to reserve existing transmission capacity to serve the needs (current and reasonably forecasted) of its existing native load (retail customers)." Order 888-A at 30,198; see also Order 888 at 31,694, 31,747 ("transmission provider may reserve in its calculation of ATC transmission capacity necessary to accommodate native load growth reasonably forecasted"). Only ATC that is sold by NSP on a firm basis (i.e., not interruptible for economic reasons) benefits from the curtailment priority scheme that requires all firm reservations to be treated equally, including direct-sale service to native load. In other words, NSP and other

transmission-owning utilities may withhold from ATC that is offered for firm reservation all of the existing and future capacity on its transmission system that they need to provide uninterrupted service to existing and forecasted direct-sale native-load customers. See Order 888-A at 30,322.

The Eighth Circuit failed to comprehend the firm-service curtailment rule of Order 888, which in fact allows utilities to assure service to direct-sales native-load customers. The Commission had ruled:

> In terms of reliability, we believe that sufficient safeguards have been established to protect native load. In particular, the transmission provider is responsible for planning and maintaining sufficient transmission capacity to safely and reliably serve its native load. Orders 888 and 889 permit the transmission provider to reserve, in its calculation of ATC, sufficient capacity to serve native load.

Order 888-A, at 30,278. The Eighth Circuit's finding of an irreconcilable conflict between NSP's state law obligations to retail customers and its duties under FERC Order 888 was a fatal factual error.

B. The Eighth Circuit Erred In Concluding That Wholesale Customers Have Greater Access to Alternative Power Sources

The Eighth Circuit was also factually incorrect when it concluded, with no record citations and no record support, that wholesale customers always have access to alternative power sources as opposed to vertically integrated transmission-owning utilities. To the contrary, transmission-owning utilities typically have generation that can be called upon if particular transmission paths are curtailed, while wholesale transmission-dependent customers often do not. Similarly, transmission-owning utilities have superior transmission interconnections vis-à-vis their wholesale customers and non-vertically integrated competitors. There is no reason to believe that the retail native load customer of a competitive (non-vertically integrated) power supplier has any more (or less) access to alternative supply than that of the similarly situated customer of the host utility.

CONCLUSION

For the foregoing reasons, Amici respectfully urge this Court to grant Enron's petition for certiorari. Alternatively, if the case becomes moot through NSP's withdrawal of its proposal, this Court should vacate the Eighth Circuit's NSP Decision and remand it to that court with instructions to dismiss the case as moot.

Respectfully submitted,

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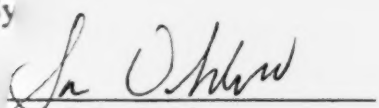

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